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VIA ECFS
Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Presentation: WC Docket No. 07-135

Dear Ms. Dortch:

Yesterday, January 31, 2011, and today, February 1, 2011, James Groft, CEO of Northern Valley Communications, LLC, former Commissioner Harold Furchtgott-Roth, David Carter, and I met with Commissioner Meredith Atwell Baker; Brad Gillen, Legal Advisor to Commissioner Baker; Christine Kurth, Legal Advisor to Commissioner McDowell; Margaret McCarthy, Legal Advisor to Commissioner Copps; Angela Kronenburg, Legal Advisor to Commissioner Mignon Clyburn; and Jenny Prime, Lynne Engledow, Randy Clarke, John Hunter, Doug Slotten, Jay Atkinson, Al Lewis, and Travis Litman from the Wireline Competition Bureau.

Northern Valley addressed the following issues:

- We discussed the Commission's precedent regarding self help refusal to pay tariffed access charges and the potential unintended consequences flowing from the Commission's recent *All American* Order. *All American Telephone Co. et al. v. AT&T*, 2011 WL 194539 (F.C.C.) (Jan. 20, 2011). The *All American* decision ignores or fails to adequately address a series of Commission decisions finding that an IXC's refusal to pay tariffed charges violates the Act. *See, e.g.*, *Communique Telecommunications, Inc. d/b/a LOGICALL*, 10 FCC Rcd. 10399, ¶ 36 (1995); *MCI Telecommunications Corp.*, 62 FCC 2d 703, ¶¶ 6 -7 (1976); *Carpenter Radio Company*, Memorandum Opinion and Order, 70 FCC 2d 1756, ¶ 6 (1979); *Tel-Central of Jefferson City Missouri, Inc. v. United Telephone Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 8338, 8339 (1989); *Business WATS, Inc. v. American Tel. and Tel. Co.*, Memorandum Opinion and Order, 7 FCC Rcd. 7942, ¶ 2 (Com. Car. Bur. 1992); *National Communications Association, Inc. v. AT&T Co.*, 2001 WL 99856, *6 (S.D.N.Y. Feb. 5, 2001).

- We discussed that recognition of the Commission's cases indicating that the Commission is not a collection agency does not necessarily result in a conclusion that an IXC's refusal to pay access charges is *never* a violation of the Act.

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- We discussed that the Commission should exercise its authority to make clear that an IXCs refusal to pay tariffed access charges is an "unjust and unreasonable practice" in violation of section 201(b), 47 U.S.C. § 201(b). *See Global Crossing Telecommunications, Inc. v. Metrophone Telecommunications, Inc.*, 550 U.S. 45 (2007). In *Global Crossing*, the Supreme Court held that the Commission is empowered to declare it to be an unjust and unreasonable practice for a carrier to refuse to pay charges that are assessed pursuant to the Commission's rules.

Specifically, the *All American* Order conflicts with existing precedent and may potentially hinder a LEC's ability to collect for tariffed switched access charges. While we recognize and respect the Commission's long-standing precedent declaring that it is not a collection agency for carriers, we are concerned that certain language in *All American* will inadvertently encumber a LEC's ability to maintain claims under the Act for an IXC's nonpayment of tariffed charges. *See, e.g., All American*, ¶ 9 ("AT&T did not violate sections 201(b), 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue, regardless of whether it filed a rate complaint with the FCC") (emphasis added); *id.* at ¶ 12 ("*a failure to pay tariff access charges does not constitute a violation of the Act.*") (emphasis in original); *id.* ("the CLECS have *no claim in a court* or at the Commission that AT&T violated the Act in its role as a customer.") (emphasis added).

The Commission on numerous occasions has opined that "customers who claim that tariff rates are unreasonable may file complaints with the Commission under Section 208 of the Communications Act, but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable." *Communique Telecommunications, Inc. d/b/a LOGICALL*, 10 FCC Rcd. 10399, ¶ 36 (1995); *see also MCI Telecommunications Corp.*, 62 FCC 2d 703, ¶6 (1976) ("We find that MCI is legally obligated to pay [Pacific Bell] all charges properly billed pursuant to [Pacific Bell] Facility Tariff FCC No. 126. MCI's self-help approach is contrary to Section 203 of the Communications Act of 1934, as amended, and existing case law. Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. . .We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services."); *id.* ¶ 7 ("A finding that self-help is not an acceptable remedy does not leave MCI without recourse. If MCI thought that AT&T acted unlawfully by refusing to provide either the Telpak service or the single circuits between Oakland and Phoenix, it had recourse to Section 206-209 of the Communications Act which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act."); *Carpenter Radio Company*, Memorandum Opinion and Order, 70 FCC 2d 1756, ¶ 6 (1979) ("[A] customer has a legal obligation to pay all tariffed rates for telecommunications services (or charges properly incorporated by reference, as here) until such time as these rates are

found unlawful by the Commission of a court of competent jurisdiction."); *Tel-Central of Jefferson City Missouri, Inc. v. United Telephone Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 8338, 8339 (1989) ("[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties[.]"); *Business WATS, Inc. v. American Tel. and Tel. Co.*, Memorandum Opinion and Order, 7 FCC Rcd. 7942, ¶ 2 (Com. Car. Bur. 1992) ("The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."); *National Communications Association, Inc. v. AT&T Co.*, 2001 WL 99856, *6 (S.D.N.Y. Feb. 5, 2001). ("The clear line of authority regarding rate disputes is that the customer may not resort to self-help; that is, the customer may not merely refuse payment of the disputed rate but must pay the rate and then bring an action to determine the validity of the carrier's actions."). *All-American* ignores this precedent.

The Commission's reliance on the "collection action" cases to conclude that a refusal to pay can ***never*** be a violation of the Act does not tell the full story. Most of these cases simply point out that the Commission is not the proper forum to collect fees, but do not say that a failure to provide payment ***never*** constitutes a violation of the Communications Act. *See, e.g.*, *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd. 17973, ¶ 29 (2007). ("Moreover, any complaint instituted by Farmers to recovery fees allegedly owed by Qwest would constitute a 'collection action' which the Commission repeatedly has declined to entertain."); *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd. 7457, n. 93 (2004) ("Under Sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore, we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate."); *Beehive Telephone Inc. and Beehive Telephone Nevada, Inc. v. The Bell Operating Companies*, 10 FCC Rcd. 10562, ¶ 37 & n.90 (1995) ("The BOCs cross-complained for amounts billed to Beehive, which Beehive has not paid. The BOCs' cross-claim does not allege a violation of the Act ***over which we have jurisdiction***," noting that the Commission did not have jurisdiction simply because it "is not a collection agent for carriers with respect to unpaid tariffed charges.") (emphasis added). *All-American* extends the import of the "collection action" cases far beyond their express language about where certain claims should be brought.

In addition to going too far in stating that "AT&T did not violate sections 201(b), 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue, regardless of whether it filed a rate complaint with the FCC," the Commission's order may have the unintended consequence of depriving CLECs of any avenue for recovery of access charges in jurisdictions where Courts may conclude that they are also barred from seeking

recovery under state-law theories. That is, the Commission should understand the potential impact of the *All American* decision in the larger context of the difficult struggle small carriers face in seeking to be paid for the work that they do for the benefit of the IXCs in terminating their long-distance traffic. For example, Qwest and other IXCs have argued for some time that the filed rate doctrine prohibits LECs from asserting state law-based claims to recover unpaid access charges. For example in *Sancom, Inc. v. Qwest Communications Corp.*, No. 4:07-cv-04147 (D.S.D.), Qwest filed a motion to dismiss (before any determination was made regarding the applicability of Sancom's tariff) Sancom's state law claims of unjust enrichment and tortious interference with business relations as barred by the filed rate doctrine. *See* ECF No. 50, Mot. To Dismiss, *Sancom, Inc. v. Qwest Communications Corp.*, No. 4:07-cv-04147 (D.S.D. Sept. 29, 2008).[1] Northern Valley has also faced (and will likely again face) similar arguments from Qwest and others.

Indeed, the filed rate doctrine and the tariff filing regime has been turned on its head and is being used by IXCs to avoid paying access charges, rather than providing the protection and certainty that the tariff filing process was designed to provide LECs. This is true even when a tariff has been "deemed lawful" under 47 U.S.C. § 204(a)(3), such as Northern Valley's new tariff. And, while in no way conceding the validity of the IXCs' arguments regarding the import of the filed rate doctrine, Northern Valley highlights them to make clear that LECs face increasing challenges in collecting their tariffed access charges. Indeed, Northern Valley notes that it is being forced to spend up to ten percent of its revenues per year on litigation expenses. As evidenced by Qwest's recent argument that "Communications Act claims are limited to claims by a customer against the carrier who provided it with service," IXCs now seek to use the *All American* decision to foreclose another avenue of access charge fee recovery, and will only embolden embolden IXCs to push for new ways to avoid paying access charges by engaging in self help. *See* Email from C. Steese to Counsel in Tier 1 JEG Telecommunications Cases (Jan. 25, 2011), attached hereto.

In evaluating the appropriate path forward, we encourage the Commission to make clear that an IXC's refusal to pay tariffed rates for interstate access services is a violation of section 201(b) of the Act, which prohibits "unjust and unreasonable practices." In this regard, careful review of the Supreme Court's decision in *Global Crossing Telecommunications, Inc. v. Metrophone Telecommunications, Inc.*, 550 U.S. 45 (2007), is warranted. In *Global Crossing*,

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[1] That federal court did ultimately dismiss those claims, before later agreeing to refer the case to the Commission for a determination of whether the tariff applied and, if not, whether compensation may nevertheless be due. Indeed, the irony of the Commission's *All American* decision is that, while the Commission does not serve as a collection agency, by failing to take a strong position against self help and implementing a new fact-specific inquiry into the applicability of LECs' tariffs to various types of traffic, the Commission has created a scenario where courts are increasingly uncertain about how to resolve collection action cases and therefore refer issues to the Commission for resolution.

the Supreme Court affirmed the Commission's decision that a failure by a long distance provider to pay the compensation owed to a pay phone operator was an unjust and unreasonable practice in violation of section 201(b).

The Supreme Court observed that the Commission's determination was reasonable, "[t]hat is to say, in ordinary English, ***one can call a refusal to pay*** Commission-ordered compensation despite having received a benefit from the payphone operator a "practice[e] … in connection with [furnishing a] communication service . . . that is . . . ***unreasonable***." *Id.* at 55 (alteration in original) (emphasis added). The Supreme Court's discussion of the history of the Communications Act and the Commission's rate-setting practices are also pertinent. For example, the Court observed:

> The history of these sections-including that of their predecessors, §§ 8 and 9 of the Interstate Commerce Act-simply reinforces the language, making clear the purpose of § 207 is to allow persons ***injured by § 201(b)*** violations to bring federal-court damages actions. *See, e.g., Arizona Grocery Co.*, 284 U.S., at 384-385, 52 S.Ct. 183 (Interstate Commerce Act §§ 8-9); Part I-A, supra. History also makes clear that ***the FCC has long implemented § 201(b) through the issuance of rules and regulations***. This is ***obviously so when the rules take the form of FCC approval or prescription for the future of rates that exclusively are "reasonable."*** *See* 47 U.S.C. § 205 (authorizing the FCC to prescribe reasonable rates and practices in order to preclude rates or practices that violate § 201(b)); 5 U.S.C. § 551(4) ("'rule' ... includes the approval or prescription for the future of rates ... or practices"). It is also so when the FCC has set forth rules that, for example, require certain accounting methods or insist upon certain carrier practices, while (as here) prohibiting others as unjust or unreasonable under § 201(b).
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> Moreover, the underlying regulated activity at issue here resembles activity that both transportation and communications agencies have long regulated. Here the agency has determined through traditional regulatory methods the cost of carrying a portion (the payphone portion) of a call that begins with a caller and proceeds through the payphone, attached wires, local communications loops, and long-distance lines to a distant call recipient. The agency allocates costs

> among the joint providers of the communications service and requires downstream carriers, in effect, to pay an appropriate share of revenues to upstream payphone operators. Traditionally, the FCC has determined costs of some segments of a call while requiring providers of other segments to divide related revenues. *See, e.g., Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-151, 51 S.Ct. 65, 75 L.Ed. 255 (1930) (communications). And traditionally, transportation agencies have determined costs of providing some segments of a larger transportation service (for example, the cost of providing the San Francisco-Ogden segment of a San Francisco-New York shipment) while requiring providers of other segments to divide revenues. *See, e.g., New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923); *Chicago & North Western R. Co.*, 387 U.S. 326, 87 S.Ct. 1585, 18 L.Ed.2d 803; *cf. Cable & Wireless P.L.C.*, 166 F.3d, at 1231. In all instances an agency allocates costs and provides for a related sharing of revenues.
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> In these ***more traditional instances***, transportation carriers and ***communications firms entitled to revenues under rate divisions or cost allocations might bring lawsuits under § 207***, or the equivalent sections of the Interstate Commerce Act, and ***obtain compensation or damages***. *See, e.g., Allnet Communication Serv., Inc. v. National Exch. Carrier Assn., Inc.*, 965 F.2d 1118, 1122 (C.A.D.C.1992) (§ 207); *Southwestern Bell Tel. Co.*, supra, at 305, 43 S.Ct. 544 (same); *Chicago & North Western Transp. Co.*, supra, at 1224-1225 (Interstate Commerce Act equivalent of § 207).

Id. at 53 – 57 (emphasis added).

Thus, the Supreme Court suggests that in "more traditional instances," such as the provision of tariffed access services, a carrier would be entitled to bring a lawsuit under "section 207" to "obtain compensation or damages." However, section 207 permits a "person claiming to be damaged ***by any common carrier subject to the provisions of this chapter***" to file a complaint to the Commission or the "district court of the United States of competent jurisdiction." Thus, while the Supreme Court's decision makes clear that the failure to pay tariffed charges should enable a carrier to seek recourse through section 207, the *All American* decision concludes that self help is not a violation of Act and, as a result, calls into serious question whether a claim may be maintained pursuant to section 207.

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Also of significance, the Supreme Court specifically rejected the argument adopted by the Commission in the *All American* order that an IXC's failure to pay cannot constitute a violation of the Act, because the IXC receives service as a "customer" (rather than a "carrier") and the Act only addresses actions of "carriers."[2] Specifically, the Supreme Court stated:

> Third, Justice THOMAS . . . disagrees with the FCC's interpretation of the term "practice." ***He, along with Global Crossing, claims instead that §§ 201(a) and (b) concern only practices that harm carrier customers, not carrier suppliers.*** *Post*, at 1531 - 1532 (SCALIA, J., dissenting); Brief for Petitioner 37-38. ***But that is not what those sections say. Nor does history offer this position significant support.*** A violation of a regulation or order dividing rates among railroads, for example, would likely have harmed another carrier, not a shipper. *See, e.g., Chicago & North Western Transp. Co.*, 609 F.2d, at 1225-1226 ("Act ... provides for the regulation of inter-carrier relations as a part of its general rate policy"). Once one takes account of this fact, it seems reasonable, not unreasonable, to include as a § 201(b) (and § 207) beneficiary a firm that performs services roughly analogous to the transportation of one segment of a longer call. We are not here dealing with a firm that supplies office supplies or manual labor. *Cf., e.g., Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 257, 51 S.Ct. 458, 75 L.Ed. 1010 (1931) ("practice" in § 1 of the Interstate Commerce Act does not encompass employment decisions). The long-distance carrier ordered by the FCC to compensate the payphone operator is so ordered in its role as a provider of communications services, not as a consumer of office supplies or the like. It is precisely because the carrier and the payphone operator jointly provide a communications service to the caller that the carrier is ordered to share with the payphone operator the revenue that only the carrier is permitted to demand from the caller. *Cf. Cable & Wireless P.L.C.*, 166 F.3d, at 1231 (finding that § 201(b) enables the Commission to regulate not "only the terms on which U.S. carriers offer telecommunication services to the public," but also "the prices U.S. carriers pay" to

[2] *All American*, ¶ 18 ("the provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay.").

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> foreign carriers providing the foreign segment of an international call).

Id. at 62-63 (emphasis added).

Prior Commission precedent has already established that IXC **self help is a violation of the Act** (that may be remedied in federal court) and the *All American* decision fails to appropriately consider the distinction between the Commission's "collection action" cases and this existing precedent recognizing that self help can be a violation of the Act. We do not take issue with the conclusion that the Commission is not the appropriate venue to seek the collection of tariffed access charges, but are significantly concerned about the language suggesting that no violation of the Act occurs when a carrier refuses to pay charges assessed pursuant to a lawful tariff. Therefore, the Commission should take action to make absolutely clear that IXC self help is an unjust and unreasonable practice in violation of section 201(b) of the Act.

Sincerely,

Ross A. Buntrock